

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. _____
	)	
BETTERROADS ASPHALT	)	
CORPORATION Inc.,	)	
	)	
Defendant.	)	
	)	

**CONSENT DECREE**

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Army Corps of Engineers (USACE), filed the Complaint herein against Defendant Betterroads Asphalt Corporation (“BAC” or “Defendant”), alleging that Defendant violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendant violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States on Rio Grande de Añasco, at the Municipality of Añasco, PR, (the “Añasco Site,” as more fully described in the Complaint) without authorization by the United States Army Corps of Engineers;

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); and (2) to require Defendant to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims against Defendant under the CWA set forth in the Complaint regarding the Añasco Site;

WHEREAS, the United States and Defendant agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendant in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendant in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the District of Puerto Rico pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendant conducts business in this

District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

## **II. APPLICABILITY**

4. The obligations of this Consent Decree shall apply to and be binding upon Defendant, its officers, directors, agents, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with Defendant whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against Defendant, Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting in concert or participation with the Defendant, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the Añasco Site shall not alter or relieve Defendant of its obligation to comply with all of the terms of this Consent Decree.

## **III. SCOPE OF CONSENT DECREE**

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendant under CWA Section 301 concerning the Añasco Site.

7. Except as in accordance with this Consent Decree, Defendant and its agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

8. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the USACE's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

9. This Consent Decree in no way affects or relieves Defendant of its responsibility to comply with any applicable federal, state, or local law, regulation or permit.

10. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

11. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

12. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

#### **IV. SPECIFIC PROVISIONS**

13. Defendants shall pay a civil penalty to the United States in the amount of one hundred thousand dollars (\$100,000.00) within 30 days of entry of this Consent Decree.

14. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing USACE file number (199703879 (CD-JR) Jacksonville District) and the DOJ case number (90-5-1-4-16212). Payment shall be made in

accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Puerto Rico. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

15. Upon payment of the civil penalty required by this Consent Decree, Defendant shall provide written notice, at the addresses specified in Section VII of this Consent Decree, that such payment was made in accordance with Paragraph 14.

16. Civil penalty payments pursuant to this Consent Decree are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

17. In addition to the civil penalty in paragraph 13 above, Defendant shall donate \$75,000 to the Fundación para la Conservación de la Paloma Sabanera, Inc. (Foundation for the Conservation of the Sabanera Pigeon; hereinafter "Fundación") towards the purchase of land to be used as a habitat for the Sabanera pigeon (*Columba inornata*), a species listed as endangered under both United States and Commonwealth of Puerto Rico regulations.

18. Defendant shall make this donation with 30 days of entry of this Consent Decree. Defendant shall provide proof of this donation by delivering a copy of the canceled check to those persons identified in Section VII below. Defendant's responsibility under Paragraphs 17-18 of this Consent Decree is limited to payment of seventy-five thousand dollars (\$75,000.00) to the Fundación. This Consent Decree shall not be construed as imposing upon Defendant any responsibility for the success of the Sabanera Pigeon project.

## **V. MODIFICATION AND DISPUTE RESOLUTION**

19. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendant to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendant cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

20. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendant under this Consent Decree, except as provided in Section VI below regarding payment of stipulated penalties.

## **VI. STIPULATED PENALTIES**

21. After entry of this Consent Decree, if Defendant fails to timely fulfill any requirement of the Consent Decree, Defendant shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- A. For Day 1 up to and including Day 30 of non-compliance \$5,000.00 per day
- B. For Day 31 up to and including 60 of non-compliance \$10,000.00 per day
- C. For Day 61 and beyond of non-compliance \$15,000.00 per day

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

22. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section V shall be resolved upon motion to this Court as provided in Paragraph 19.

23. The filing of a motion requesting that the Court resolve a dispute shall stay Defendant's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendant does not prevail on the disputed issue, stipulated penalties shall be paid by Defendant as provided in this Section.

24. To the extent Defendant prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

25. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

26. Defendant shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing USACE file number 199703879 (CD-JR) and the DOJ case number (90-5-1-4-16212). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Puerto Rico. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section VIII of this Decree.

## **VII. ADDRESSES**

27. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

**A. TO USACE:**

Noel Acevedo Mendez  
Assistant District Counsel  
Antilles Office, Jacksonville District



USACE  
400 Fernandez Juncos Ave.  
Puerta de Tierra  
San Juan, PR 00901

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Angeline Purdy, Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

C. TO DEFENDANTS:

Ariel Marrero, Esq.  
Betterroads Asphalt Company  
PO Box 21420  
Rio Piedras, PR 00928

**VIII. COSTS OF SUIT**

28. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendant subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendant shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendant for noncompliance with or enforcement of this Consent Decree.

**IX. PUBLIC COMMENT**

29. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw

its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree.

#### **X. CONTINUING JURISDICTION OF THE COURT**

30. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

#### **XI. MODIFICATION**

31. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

IT IS SO ORDERED.

Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
United States District Judge

ON BEHALF OF THE UNITED STATES:

John C. Cruden  
Acting Assistant Attorney General  
Environment and Natural Resources Division

\_\_\_\_\_  
Angeline Purdy  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

Dated: \_\_\_\_\_

FOR DEFENDANT BETTEROADS ASPHALT COMPANY

\_\_\_\_\_

Dated: \_\_\_\_\_